[ORAL ARGUMENT NOT YET SCHEDULED]

No. 10-1300

10-1301, 10-1353, 10-1355

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

E.I. DU PONT DE NEMOURS AND COMPANY, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF THE PETITIONER - CORRECTED

Mark L. Keenan
mkeenan@mcguirewoods.com
Brennan W. Bolt
bbolt@mcguirewoods.com
McGuireWoods, LLP
1170 Peachtree Street NE, Suite 2100
Atlanta, GA 30309
(404) 443-5709

Steven W. Suflas
suflas@ballardspahr.com
Denise M. Keyser
keyserd@ballardspahr.com
Ballard Spahr LLP
210 Lake Drive East, Suite 200
Cherry Hill, NJ 08002-1163
(856)761-3466

Attorneys for E.I. du Pont de Nemours and Company and E.I. du Pont de Nemours, Louisville Works

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

All parties appearing before the National Labor Relations Board below and parties or intervenors in this Court:

1. E.I. du Pont de Nemours and Company
2. E.I. du Pont de Nemours, Louisville Works
3. National Labor Relations Board
4. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

Corporate Disclosure Statement Pursuant to FRAP 26.1

(a) E.I. du Pont de Nemours and Company and E.I. du Pont de Nemours, Louisville Works have no parent company and no publicly held corporation owns 10% or more of their stock.

(b) E.I. du Pont de Nemours and Company and E.I. du Pont de Nemours, Louisville Works are engaged in the chemical manufacturing business.

Rulings Under Review

E.I. Du Pont De Nemours, Louisville Works, 355 NLRB No. 176 (Aug. 27, 2010) and E.I. Du Pont de Nemours and Company, 355 NLRB No. 177 (Aug. 27, 2010)). These opinions and final orders of the National Labor Relations Board may be found in the Joint Appendix at pp. 15 and 27, respectively. This case has not been previously before this Court.

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STATEMENT OF JURISDICTION

This is a consolidated petition for review of two final Orders of the National Labor Relations Board ("NLRB") entered on August 27, 2010 in NLRB Case Nos. 9-CA-40777 (Louisville Works), 9-CA-41634 (Louisville Works) and 4-CA-33620 (Edge Moor). The NLRB had subject-matter jurisdiction over this matter pursuant to 29 U.S.C. § 152. This Court has jurisdiction to hear this petition for review pursuant to 29 U.S.C. § 160(f) and Rule 15 of the Federal Rules of Appellate Procedure. Petitioner filed its Petition for Review on September 24, 2010.

STATUTES, REGULATIONS AND OTHER AUTHORITIES

29 U.S.C. §158(a):

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title [Section 7 of the National Labor Relations Act].

* * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 159(a) of this title [Section 9(a) of the National Labor Relations Act].

STATEMENT OF THE ISSUES TO BE RAISED ON APPEAL

Petitioner presents the following Statement of Issues to be raised on review:

1. Did the NLRB commit legal error by finding that DuPont's unilateral implementation of changes to its benefit plans violated Sections 8(a)(1) and (5) of the National Labor Relations Act?

STATEMENT OF THE CASE

Ignoring the parties' agreements and negating over ten years of established past practice by invoking an inappropriate "waiver" analysis, the National Labor Relations Board (NLRB or the Board) held below that DuPont's implementation of annual, recurring changes to its comprehensive, nationwide welfare and medical benefits plan, the BeneFlex Flexible Benefits Plan ("BeneFlex"), violated the National Labor Relations Act (NLRA) at two unionized locations (Edge Moor and Louisville Works) represented by the intervenor Union.[1]

The Union at both locations expressly agreed in the mid-1990s to adopt BeneFlex for bargaining unit workers, encompassing acceptance of the BeneFlex ERISA plan documents, which contained "reservation of rights" language giving DuPont the "sole right to change or discontinue this Plan in its sole discretion," as well as DuPont's promise to provide the same benefits to its entire domestic workforce. DuPont exercised its rights annually on January 1 of each year from 1996-2005, implementing adjusted premiums, coverages, and other new features of BeneFlex for all U.S. employees. The Union filed separate unfair labor practice charges at the

[1] At all times pertinent to this appeal, the Steelworkers were the bargaining agent and the successor to a series of predecessor labor organizations. (App. 15, 30). The Steelworkers and their predecessors are collectively referred to as "the Union" throughout this brief.

Louisville and Edge Moor sites, challenging the 2004 changes (at Louisville) and 2005 changes (at both locations) claiming that because the applicable collective bargaining agreements had expired, DuPont was required to bargain over those changes.

By decision dated December 15, 2005, Administrative Law Judge Karl Buschman dismissed the Louisville charges, finding that the annual BeneFlex changes in 2004 and 2005 were consistent with the parties' agreements, as well as long-standing, established past practice. Thus, by implementing the changes, DuPont actually maintained the existing post contract status quo as required by the NLRA. One week later, on December 23, 2005, Administrative Law Judge Paul Bogas found to the contrary, holding that the same changes implemented at Edge Moor under the same conditions in 2005 were unlawful.

Nearly five years later, on August 27, 2010, a divided NLRB issued opinions in both cases finding that DuPont's implementation of the nationwide changes to BeneFlex violated the NLRA. Ignoring its own and this Circuit's precedents, the Board majority held that the changes at issue were unlawful based on a results-oriented "waiver" analysis. The opinion held that all previous changes at both locations had been permissible only because the Union had "waived" its right to bargain via a purported "management rights" clause. According to the majority, because the union contracts at both locations had expired, the waiver of the Union's right to bargain over the annual changes to BeneFlex no longer existed. Despite its own precedent to the contrary, the NLRB also rejected ALJ Buschman's holding that the annual changes were part of the established status quo stating that a past practice based on a contractual "union waiver" did not apply after the parties' contract expired.

A more thorough and well-reasoned dissent pointed out that "the majority both applies an incorrect legal analysis and incorrectly limits Board precedent." (App. 18). As the dissent concluded:

> Fundamental fairness and the Board's past practice doctrine govern the result here because the Union cannot have it both ways. The Union is claiming that it is entitled to receive all benefits available under the plan without the language (via the reservation of rights clause) that permits the Respondent to modify that very benefit. The Union cannot take the benefits of the plan while ignoring the provisions it finds distasteful.

(App. 22).

The NLRB's decisions impermissibly: (1) re-write DuPont's bargain with the Union by now requiring DuPont to undo BeneFlex changes at both locations despite the fact that changes to BeneFlex were implemented at all other U.S. locations; (2) ignore the parties' on-going agreement that BeneFlex was offered and accepted conditioned upon the reservation of

DuPont's rights in the governing plan documents; and (3) ignore a long established past practice/status quo. This appeal follows.

STATEMENT OF FACTS

A. Overview

One of the world's leading chemical manufacturers, DuPont operates plants in Louisville, Kentucky and Edge Moor, Delaware. (App. 15, 30)[2]. Production and maintenance employees at the Louisville facility have been successively represented by the Union for nearly 50 years under a series of contracts. (App. 15, 18, 143: ¶ 1). The Louisville collective bargaining agreement pertinent to this case expired on March 21, 2002. (App. 15, 160: ¶ 48). The Union also has represented the production and maintenance employees at Edge Moor for many years. (App. 30, 623-24: ¶ 2). The Edge Moor collective bargaining agreement at issue expired on May 31, 2004. (App. 30, 638-39: ¶ 38).

B. The BeneFlex Plan

Beginning in 1991, DuPont created BeneFlex, a comprehensive, nationwide welfare benefits plan for its entire domestic workforce of about 60,000. (App. 625: ¶ 6). BeneFlex is a cafeteria style, flexible benefits plan, which includes a variety of components such as healthcare through the BeneFlex Medical Care Plan ("BeneFlex Medical"), dental and vision coverages, and life insurance, among others. (App. 44-45). Since inception,

[2] Referenced pages from the parties' Joint Appendix are denoted as "(App.)."

ERISA plan documents for both BeneFlex and BeneFlex Medical have contained an express reservation of DuPont's right to change either program in its sole discretion, which state "[t]he Company reserves the sole right to change or discontinue this Plan in its discretion…". (App. 15, 31, 174, 195).

Annual enrollment periods occur each fall, when all employees elect the medical coverages and other benefit options desired. (App. 52-53, 144-45: ¶ 6, 624 ¶ 3). As a self-insured plan, all claims made and administrative expenses incurred under BeneFlex Medical are paid out of funds contributed from DuPont's operating budget and by participating employees. (App. 18, 23, 28, 31, 144-145: ¶ 6). All DuPont employees (union and non-union) in the United States participate in BeneFlex. (App. 45, 144-45: ¶ 6, 535).

C. The Union's Acceptance Of BeneFlex At Louisville

During the parties' collective bargaining negotiations in 1994, the Union accepted DuPont's offer to include Louisville bargaining unit employees in BeneFlex, including BeneFlex Medical. (App. 144: ¶ 4). As a condition of that proposal, DuPont explained to the Union that under the BeneFlex plan documents' "reservation of rights" terms, it would be permitted to alter unilaterally the levels and/or costs of benefits on an annual basis provided that any such changes would be made only on a nationwide basis. (App. 46-48, 145: ¶ 7, 174: ¶ 4). The Union accepted the program based on these specific discussions and understanding that participation in BeneFlex was subject to all terms and conditions of the plan documents including the reservation of rights clause. (App. 145: ¶ 7, 459). Thus, BeneFlex was implemented at Louisville effective January 1, 1995. (App. 145: ¶ 7).

The collective bargaining agreement ratified by the Union, however, referenced only BeneFlex Medical by name, rather than the BeneFlex Plan itself. Indeed, at all times pertinent to this appeal, the parties' agreement never mentioned BeneFlex. (App. 169: ¶ 2; 475).

This leads to several critical facts simply ignored or glossed over by the NLRB. First, even though the contract referenced only BeneFlex Medical rather than BeneFlex, (App. 168-200), Louisville employees have received the full panoply of benefits provided under BeneFlex since 1995. (*see, e.g.* App. 170-74, 238-45, 320-21).

Second, during the 1994 negotiations, the parties specifically discussed and agreed that BeneFlex had been offered with a condition – the Union's acceptance of the "reservation of rights" set out in the BeneFlex plan documents. (App. 145: ¶ 7, 316-17). Thus, the Union knew full well that DuPont had the right to unilaterally alter BeneFlex. (App. 316-17, 459).

Finally, the Union understood it was waiving its right to bargain over changes to BeneFlex so long as the plan was provided because one initial objection the Union voiced, and later abandoned, was that DuPont had "total control" over BeneFlex. (App. 459).

D. The Union's Acceptance Of BeneFlex at Edge Moor

Events at Edge Moor were similar. Negotiations culminated in an August 1993 agreement to provide BeneFlex, including BeneFlex Medical, effective January 1, 1994. (App. 625: ¶¶ 7, 11). As at Louisville, the Union agreed that, with the "reservation of rights" clause in the plan documents, DuPont had "the sole right to change or discontinue this Plan in its discretion." (App. 625: ¶¶ 7, 8). Thus, as at Louisville, the Union at Edge Moor understood that participation in BeneFlex was contingent upon acceptance of this condition. (App. 626: ¶ 9). As at Louisville, the contract language did not mention the overall BeneFlex program by name, but employees nevertheless received all BeneFlex components. (App. 661-62).

The scope of DuPont's rights was reconfirmed in subsequent collective bargaining. On October 11, 1999, in discussing upcoming changes to BeneFlex for the next year, DuPont reiterated that it had the right to alter and modify coverages and costs under the reservation of rights' language in the plan documents. (App. 631: ¶ 23). Likewise, during contract bargaining in 2000, negotiators repeated that DuPont continued to retain the right to modify BeneFlex coverages, premiums, and costs pursuant to the "reservation of rights" language. (App. 633: ¶ 27). The Edge Moor 2000 collective bargaining agreement subsequently confirmed the parties' agreement, stating: "…employees shall also receive benefits as provided by the Company's BeneFlex Benefits Plan, subject to all terms and conditions of said Plan". (App. 707)

E. The Past Practice Of Unilateral Changes To BeneFlex

Every year since its introduction at both sites, annual nationwide changes to BeneFlex were implemented on January 1 of each year for all of DuPont's U.S. employees. As summarized by a chart in the parties' Joint Appendix (App. 841-44), these annual changes included regular modifications to premiums, co-pays, and benefits levels, but were at times more far reaching, with entire programs added or dropped in some years. Many of these changes improved the BeneFlex offerings.

Annual modifications were never a surprise to workers or the Union. Employees received information concerning upcoming changes in advance of the annual enrollment period each fall, (App. 52-53, 144-45: ¶ 6), with the Union receiving prior notice of upcoming changes at meetings with management. (App. 147-64: ¶¶14, 16, 21, 25, 27, 29, 41, 52, 58, 63).

Simply stated, since BeneFlex was agreed to and instituted at both locations, the parties never bargained over the annual changes, and for years, the Union never objected or protested. This is a particularly telling "past practice," given that the Louisville contract does not even identify BeneFlex and the Edge Moor contract did not do so until a 2000 memorandum reconfirmed the Union's acceptance of the reservation of rights language in the BeneFlex plan documents. Thus, even apart from the contractual language, the Union established a clear practice of consistently accepting DuPont's unilateral, annual changes to BeneFlex at Louisville and Edge Moor, as put into effect for all of DuPont's domestic workforce.

F. The Union's Efforts To Undo The Agreement Over BeneFlex

1. Louisville

On October 12, 2000, the Union asked for information, allegedly to evaluate DuPont's "proposed" changes to BeneFlex and engage in bargaining. (App. 154: ¶ 30, 308-10). DuPont replied that these changes were not "proposals" (App. 312-15), and the Union for the first time asserted that it was unlawful for the company to unilaterally implement the 2001 changes. (App. 311-15). Despite this claim, the Union did not file unfair labor practice charges or grievances contesting the 2001 implementation.

On January 16, 2002, the Union opened the collective bargaining agreement to negotiate a new one. (App. 159: ¶ 46, 356). The parties expressly agreed that if agreement was not reached by contract expiration, DuPont would continue all terms and conditions of the contract day-to-day until something different was bargained. (App. 159-60: ¶ 47, 357-58). On October 24, 2002, the Union wrote to request bargaining over the upcoming BeneFlex changes. (App. 161: ¶ 53, 374). DuPont responded that it was not required to bargain over the changes, but would consider Union proposals for a new or different healthcare plan. (App. 37, 161: ¶ 54, 375-84). On January 1, 2003, as it always had, DuPont implemented the annual changes to BeneFlex even though the union contract had expired. (App. 161: ¶ 55). This post-contract change was simply ignored by the NLRB majority, which mistakenly found that all BeneFlex changes at Louisville were implemented while the parties were under contract. (App. 15-16).

The same pattern of correspondence was repeated in the fall of 2003 and 2004 concerning annual BeneFlex changes. (App. 163-164: ¶¶ 59-61, 64-65). Although the Union's correspondence in those years requested bargaining over the announced changes, the Union never proposed a new or different medical plan, nor did it make any specific proposals with respect to BeneFlex, nor did it seek to discuss the upcoming changes to BeneFlex at the bargaining table. After implementation, the Union subsequently filed unfair labor practice charges challenging the January 1, 2004 (9-CA-40777) and January 1, 2005 (9-CA-41634) implementations at issue in this appeal. (App. 163-65: ¶¶ 59-61, 64-65; 411-13, 423-25).

2. Edge Moor

Beginning in 1994 and continuing each year thereafter until 2004, the parties followed the same practice as at Louisville. Each October, DuPont and the Union met and discussed the upcoming changes to BeneFlex, which were later communicated to all employees (union and non-union) as part of open enrollment, with the company-wide changes then implemented on January 1 of each year. (App. 627-638: ¶¶ 13, 15, 17, 19, 21, 24, 30, 32, 34, 37). For a decade, DuPont never offered to negotiate the annual changes, and the Union never sought to bargain them nor protest their implementation. Id.

On March 31, 2004, DuPont notified the Union that it was terminating the existing collective bargaining agreement in order to bargain a new one. (App. 638). Negotiations for a successor contract began in April of 2004 and continued into 2005, (App. 638-46: ¶¶ 38-65), covering a panoply of topics and with the parties reaching tentative agreements on many. (App. 550).

The annual nationwide modifications to BeneFlex were announced at Edge Moor on October 11, 2004. (App. 545, 642: ¶ 53). At the next bargaining session, just two days later, the Union did ***not*** request to bargain these changes. (App. 545-46).

On October 14, Attorney Kathleen Hostetler wrote to request bargaining over the proposed BeneFlex changes for 2005. (App. 546, 812). However, the Union negotiators led by Attorney James Runckel effectively abandoned this token request, by ***never*** expressing any desire or making any effort to bargain over this topic at the table. (App. 547).

A month later at the December 16, 2004 bargaining session, DuPont announced that it had no choice but to implement the announced changes effective January 1, 2005. (App. 644). Since no agreement had been reached and no further negotiating sessions were scheduled, DuPont had to act to ensure coverage for its workforce. (App. 549-50). It is undisputed that the Union never sought to discuss any of the specific changes for the 2005 BeneFlex plan year. (App. 535, 547). Following implementation of the changes on January 1, 2005, the Union filed an unfair labor practice charge, (Case 4-CA-33620) asserting that the BeneFlex changes at Edge Moor violated the NLRA.

G. The NLRB's Decisions

The NLRB issued separate Complaints arising out of the charges at Louisville and Edge Moor. The cases were tried separately.

In the Louisville decision, ALJ Buschman concluded that DuPont's actions were lawful. (App. 26). He held that implementing the changes to BeneFlex after contract expiration was consistent with: (1) the terms of the BeneFlex plan itself; (2) the parties' agreements and understandings; and (3) a clear and well established ten-year practice of unilaterally implemented annual changes, such that the 2004 and 2005 changes actually maintained the post-contract status quo. (App. 25-26).

In contrast, relying on a "waiver" theory, ALJ Bogas concluded that DuPont's implementation of the same changes at Edge Moor in 2005 was unlawful. (App. 39). That ALJ rejected the proposition that the changes were part of an established status quo, concluding that the past practice existed solely because of a Union waiver of its right to bargain which was part of the expired contract and therefore no longer effective. (App. 35-37).

In separate 2-1 decisions, with Chairman Liebman and Member Becker in the majority, the NLRB found that DuPont's implementation of the annual, nationwide changes to BeneFlex at both Louisville and Edge Moor was unlawful. (App. 18, 27). The Board majority relied solely on a "waiver" analysis, concluding that all of the previous changes at both locations had been permissible only because the Union had "waived" its right to bargain with a contractual "management rights" clause. (App. 15-16, 27). The Board said that since both labor contracts had terminated, the management rights clauses within those contracts had expired, extinguishing the waiver of the Union's right to bargain over the annual BeneFlex changes and nullifying the past practice of annual changes which had arisen solely due to the contractual "waiver." (App. 15-17, 27). Finally, at Louisville, the NLRB rejected DuPont's argument that it was privileged to implement the changes as a discrete, recurring event, finding that DuPont refused to bargain over the changes upon request. (App. 177). The NLRB did not address this issue in its Edge Moor decision.

Member Schaumber dissented in each case, noting the majority relied on an incorrect legal theory thereby ignoring and misinterpreting controlling NLRB precedent. (App. 18-22, 27-19). The dissent recognized that the Board's Courier Journal decisions meant that DuPont was required to implement the changes because once a contract has lapsed, an employer must maintain the status quo until changes are bargained or impasse is reached:

> It is well understood, however, that the concept of "change" within labor law cannot be approached

> simplistically; under certain circumstances, not to change would be to change. Thus, wherein an employer's "changes" actually continue a status quo past practice of like changes, the employer has not changed existing conditions of employment, and therefore has not violated [the NLRA].

(App. 19-20).

The dissent also noted that the majority simply overlooked the fact that the Union had specifically agreed that bargaining unit workers at each location would receive BeneFlex subject to the plan's terms and conditions, including the express reservation of rights to DuPont to make changes to the program – – an integral part of the plan. (App. 20). There was never an agreement to provide BeneFlex benefits to Union employees on terms different from those applied to all other plan participants. (App. 20, 22). That commitment was not contained in or dependent upon any "management rights" clause in the expired collective bargaining agreements. It was part of the parties' original agreement to implement BeneFlex at each location, as well as the Union's acceptance of the reservation of rights language in the BeneFlex plan documents. (App. 20).

Finally, the dissent also acknowledged strong policy arguments supporting DuPont's actions. In an effort to provide good benefits in a cost effective manner, businesses and unions alike often look to company-wide plans to achieve necessary economics of scale, relying upon uniformity across the entire pool of participants to do so. (App. 21). As Member Schaumber noted, the majority's decision empowers unions to freeze benefits site-by-site when they disagree with a change, destroying the uniformity which makes those benefits possible in the first place, and producing an administrative nightmare for the company sponsor. (App. 21). Were the Board decisions below to stand, employers may well stop offering companywide benefits to unionized employees, driving up the cost and diminishing the benefits for all. (App. 21).

STANDARD OF REVIEW

Generally, an NLRB decision is entitled to deference and will be upheld if the Board's factual findings are supported by substantial evidence and the decision is not arbitrary and capricious. Carpenters & Millwrights, Local Union 2471 vs. NLRB, 481 F.3d 804, 808-09 (D.C. Cir. 2007). A decision is arbitrary and capricious when the Board fails to apply the proper legal standard, or where it departs from its own established precedent without "reasoned justification." Titanium Metals Corp. v. NLRB, 392 F.3d 439, 446 (D.C. Cir. 2004); Mail Contractors of America v. NLRB, 514 F.3d 27, 31 (D.C. Cir. 2008). The NLRB's decisions below ignore controlling precedents in the Courier Journal and Capitol Ford cases, which expressly reject a waiver rubric for the types of benefit changes at issue here in favor of the past practice/status quo analysis.[3]

However, this Court does not give deference to the NLRB in determining whether an employer's actions are "covered by" the parties' agreements, as at issue here. Southern Nuclear Operating Co. v. NLRB, 524 F.3d 1350, 1358 (D.C. Cir. 2008). Instead, agreements between an employer and union are interpreted de novo because the courts are charged with developing a uniform federal law of labor contracts. NLRB v. United

[3] The Courier-Journal, 342 NLRB 1093 (2004); The Courier –Journal, 342 NLRB 1148 (2004); Capitol Ford, 343 NLRB 1058 (2004).

States Postal Service, 8 F.3d 832, 837 (D.C. Cir. 1993). A non-deferential standard of review is particularly appropriate here, given that the NLRB continues to reject the "covered by" analytical framework. Provena St. Joseph Medical Center, 350 NLRB 808, 811 n. 17 (2007).[4] The NLRB instead applied a flawed waiver analysis -- a mistake it has repeatedly made. Regal Cinemas, Inc. v. NLRB, 317 F.3d 300, 312 (D.C. Cir. 2003).

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[4] Public remarks by NLRB Chairman Liebman reflect an intent to continue the Board's stubborn refusal to adopt the "covered by contract" analysis, absent Supreme Court intervention. "'We're Poised for Changes' in Labor Law, Chairman Liebman Says at ABA Conference," Daily Lab. Rep. BNA No. 216, at C-3 (Nov. 12, 2009).

SUMMARY OF THE ARGUMENT

DuPont's Petition for Review should be granted because the Board's decisions: (1) ignore this Circuit's "covered by contract" precedent and instead rely upon a faulty "waiver" analysis; (2) ignore decades of NLRB precedent which hold that DuPont was privileged to make the unilateral changes at issue here due to DuPont's obligation to maintain the "dynamic status quo" between the parties; and (3) misapply its own "waiver" doctrine assuming, arguendo, that a waiver analysis is appropriate.

This Court has repeatedly held that if the parties have negotiated and reached agreement on a term or condition of employment that permits an employer's unilateral action, the matter is considered "covered by" the parties' agreement, and the employer does not violate Section 8(a)(5). This is because the union and the employer did, in fact, exercise their bargaining rights in reaching agreement on the subject in question. This is analytically distinct from the "waiver" standard, which looks to see whether the Union gave up its right to bargain over a particular subject.

In the case at hand, DuPont and the Union agreed to have bargaining unit workers at both locations covered by Beneflex and, in doing so, specifically agreed that BeneFlex coverage was conditioned on acceptance of the reservation of rights language within the BeneFlex plan documents and acceptance of the company's authority to make nationwide changes to BeneFlex. DuPont's challenged conduct falls squarely within the parties' agreements and understandings originating with the Union's acceptance of BeneFlex. Accordingly, the unilateral changes at issue are "covered by" the parties' agreements and were not unlawful.

Alternatively, DuPont's actions were lawful because the annual BeneFlex changes were consistent with and preserved the status quo between the parties. An employer does not violate Section 8(a)(5) if it acts consistently with a clear past practice. Both the NLRB and courts have repeatedly held that an employer's obligation to maintain the status quo may include instances where it is privileged to act unilaterally. In fact, the doctrine is so well established that the converse also applies -- an employer violates Section 8(a)(5) if it fails to make changes to maintain the "dynamic status quo." In the case at hand, through the parties' agreements and actions, the well established status quo was that bargaining unit employees would continue to receive DuPont's nationwide BeneFlex plan, including all annual, recurring changes DuPont made to BeneFlex. DuPont's unilateral changes to BeneFlex at Louisville and Edge Moor in 2004 and 2005 were consistent with past practice and therefore were not unlawful changes in terms and conditions of employment.

Even applying the Board's "waiver" analysis, DuPont's Petition for Review should be granted because the evidence establishes that the Union did, in fact, waive its right to bargain over the changes to Beneflex both expressly when it agreed to accept BeneFlex for bargaining unit employees, as well as based on the parties' conduct.

The NLRB's orders destroy the heretofore national uniformity of BeneFlex, in effect dictating the creation of a new benefit plan for two small bargaining units. In light of all this, DuPont submits that its Petition For Review must be granted.[5]

[5] In the event the Court finds that the unilateral changes were unlawful, DuPont submits that the NLRB's order should be applied prospectively only given the NLRB's previous endorsement of the unilateral changes to Beneflex, the nationwide scope of the changes at issue and the length of time which has passed since those changes were implemented.

STANDING

E.I. du Pont de Nemours and Company and E.I. du Pont de Nemours, Louisville Works have standing with respect to this consolidated petition for review because both petitioners are "persons aggrieved" by final orders of the NLRB, and are seeking to have those orders modified or set aside pursuant to 29 U.S.C. § 160(f). Regal Cinemas, Inc. v. NLRB, 317 F.3d 300 (D.C. Cir. 2003).

ARGUMENT

I. The Alleged Unilateral Changes Were "Covered By" Union Agreements And Are Not Unlawful.

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer to fail or refuse to bargain in good faith with the representative of its employees. 29 U.S.C. § 158(a)(5). As a general rule, absent circumstances "justifying unilateral action," an employer violates Section 8(a)(5) if it makes a unilateral change in wages, hours or terms and conditions of employment absent agreement between the parties or an overall bargaining impasse. NLRB v. Katz, 369 U.S. 736, 743 (1962).

However, this Circuit has held repeatedly that unilateral action is permitted if the employer's actions are "covered by" an agreement between a union and an employer. Regal Cinemas, Inc. v. NLRB, 317 F.3d 300, 302 (D.C. Cir. 2003). If the parties have made an agreement that arguably permits the employer's unilateral changes, the matter is "covered by" that commitment, and there is no violation of Section 8(a)(5) or (1).

This "covered by" approach is analytically distinct from the "waiver" analysis applied below, where the NLRB requires an employer to meet the demanding standard of proving that a union clearly and unmistakably gave up its right to bargain over a particular subject. As noted by Judge Edwards:

> A union may also "waive" its right to bargain over a mandatory subject, but the "covered by" and "waiver" inquiries are analytically distinct:
>
> A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant.

NLRB v. United States Postal Service, 8 F.3d 832, 836 (D.C. Cir. 1993) (quoting Dept. of Navy v. FLRA, 962 F.2d 48, 57 (D.C. Cir. 1992)) (italics in original).[6] As Judge Posner has observed in similarly rejecting the "waiver" standard, the breadth of management's contractual rights is immaterial:

> . . . where as in this case a union agrees to a broadly worded management-rights clause, the scope of that clause depends on the usual principles of contract interpretation rather than on a doctrine that tilts the decision in the union's favor.

Chicago Tribune Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992) (citations omitted).

These principles apply to the benefit plan at issue here. In BP Amoco Corp. v. NLRB, 217 F.3d 869 (D.C. Cir. 2000), medical plan documents

[6] See also, Regal Cinemas, 317 F.3d at 312 ("Unlike waiver, by which a union knowingly and voluntarily relinquishes its right to bargain, if a subject matter is 'covered by' a collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant").

contained a "reservation of rights" clause, which gave the plan sponsor the right to modify the plan's provisions. This Court ruled that because the language of the collective bargaining agreement generally incorporated the plan into the parties' contract, this had the legal effect of incorporating the entire medical plan document as well, including the "reservation of rights" clause which authorized the unilateral changes at issue. Thus, the changes were "covered by" the parties' agreement, and the NLRB's application of a "waiver" analysis was rejected.

In the case at hand, based on the negotiations that resulted in the workforces receiving BeneFlex at Louisville and Edge Moor, the Union clearly understood and agreed that DuPont would make annual, nationwide changes to BeneFlex, and that acceptance of BeneFlex was subject to that right. It is undisputed that both BeneFlex and BeneFlex Medical plan documents contain "reservation of rights" clauses, which permit DuPont to alter, amend, modify or terminate the plans and their components. The only limitation on DuPont's discretion is that bargaining unit employees must receive the same benefits that generally apply across the company.[7]

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[7] This is recognized as a significant limitation on company discretion. Courier Journal, 342 NLRB at 1094. For example, DuPont cannot use its authority over Beneflex as leverage in contract negotiations with a union, for it must, by the very terms of the plan, offer all participants equal benefits

Throughout the period 1995-2005, DuPont made numerous regular modifications to BeneFlex in accordance with its agreed upon reserved rights. These included changes to premiums, coverages, co-pays and plan components, as well as the addition of new options such as pre-paid legal services. As ALJ Buschman correctly found, the annual changes "often benefited the employees," and DuPont never "abused its rights to effectuate changes . . . to the detriment of the unit employees" nor "deviated from the established pattern." (App. 25). Importantly, even after contract expiration, the parties were still operating under the terms of the BeneFlex plan documents. In addition, as the ALJ found, DuPont had committed at Louisville to continuing to honor the parties' agreement day to day until something different was negotiated which would have included the parties' agreements concerning BeneFlex. Thus, as in BP Amoco, DuPont's actions were "covered by" the parties' agreements concerning BeneFlex, including the agreed-upon reservation of rights language.

The Board's decision erroneously concluded that the previous unilateral changes were irrelevant, because they were made pursuant to a waiver in a "management rights" clause that expired with the parties' contract. As it has in the past, and in derogation of this Court's repeated

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across the board. Indeed, it is the Union here that wants to break that deal, obtaining different benefits under Beneflex for its members.

holdings, the NLRB applied its "waiver" analysis, once again ignoring the distinction between the concepts of "waiver" and "covered by" as it has before.[8] Thus, the majority reasoned that the essence of a management rights clause is that it is a waiver of a union's right to bargain, which cannot survive contract expiration.

> The Respondent has had the full benefit of its bargain during the term of the collective bargaining agreement. It was free to make changes to employee benefits, in its discretion, up to the agreement's expiration. At that point, the terms and conditions of employment then in place – i.e., the benefits as unilaterally established by the Respondent pursuant to the Union's waiver – became fixed, subject to the statutory duty to bargain.

(App. 17).

This analysis, which relies exclusively on what the majority considers to be the Union's "waiver" of bargaining rights over changes to BeneFlex (via "management rights" clause) that expired along with the parties' collective bargaining agreement, is fatally flawed.[9]

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[8] See Provena St. Joseph Medical Center, 350 NLRB at 811 n.17 (adhering to the NLRB's "waiver" standard and rejecting this Court's "contract coverage" standard).

[9] Part of the NLRB's confusion arises from the majority's sloppy use of the term "management-rights clause." As recognized by the dissent, at issue here is not the ordinary preservation of management's general right to act in areas outside the scope of a union contract. Rather, the "reservation of rights" clause here is a specific provision tailored to memorialize DuPont's agreed upon discretion to unilaterally modify Beneflex, which is set out in the BeneFlex plan documents.

As an initial matter, the NLRB's holding that a "management rights" clause in the parties' collective bargaining agreement constituted a Union "waiver" over the right to bargain over BeneFlex changes contravenes its own precedent which requires a "clear and unmistakable waiver." Provena St. Joseph Medical Center, 350 NLRB at 811. The Louisville collective bargaining agreement never referenced BeneFlex, and the Edge Moor agreement was likewise silent until 2000. Thus, the previous changes could not have been made pursuant to a "union waiver" exclusively contained in the collective bargaining agreements. Some other agreement and/or arrangement obviously governed the parties' previous decade of changes to BeneFlex.

In fact, the parties had accepted DuPont's authority to make BeneFlex changes – but those agreements and understandings existed both inside and outside of the parties' collective bargaining agreement. The NLRB's narrow focus on the union contracts ignores the fact that companies and unions routinely make agreements outside of, or in addition to, their commitments in a collective bargaining agreement.

For this reason, Section 301 of the NLRA authorizes suits over any contract between unions and employers – not just "collective bargaining agreements." 29 U.S.C. § 185. See Smith v. Kessville Bus Co., 709 F.2d

914, 920 (5th Cir. 1983) ("it is well established that § 301 must be broadly construed to encompass any agreement, written or unwritten, formal or informal, which functions to preserve harmonious relations between labor and management") (citing Retail Clerks Int'l Assn. v. Lyons Dry Goods, 369 U.S. 17 (1961)) (other citations omitted).

The decision in UMW 1974 Pension v. Pittston Company, 984 F.2d 469 (D.C. Cir. 1993) makes this point clear. In that case, a national collective bargaining agreement referenced certain pension trust agreements, which in turn contained a clause providing that participating employers were bound to make contributions to the trusts as specified in present and future national agreements. Several employers withdrew from national bargaining and negotiated their own individualized union contracts, with different contribution obligations to the trusts. The trustees sued, claiming that the so-called "evergreen" clause in the trust documents, as incorporated into the national agreement, bound the employers to continue to make contributions at the national agreement levels going forward. The employers argued that when the underlying national collective bargaining agreement expired and they went off to bargain on their own, that in turn terminated their duties under both the national agreement and the evergreen clause of the trust document.

This Court rejected that proposition as directly at odds with the language of the previous national union contracts, which bound the employers to all terms of the plan document; these "perpetual obligations" under the plan's evergreen clause, as created by their incorporation into national contracts, survived the expiration of those contracts containing them. As this Court wrote: "We have no reason to question the propriety of an employer agreeing to be bound to contractual duties beyond the life of a specific collective bargaining agreement." Id. at 474, n. 6 (citing Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991)).

The Union here specifically agreed that it was accepting BeneFlex subject to DuPont's right to make annual unilateral changes. Indeed, those were the only terms on which DuPont offered the program. Therefore, based on the parties' understandings and agreements at the table, the Union was bound to the BeneFlex plan documents, including DuPont's reserved rights, all of which outlived the expiration of the applicable collective bargaining agreements. Thus, the unilateral changes in 2004 and 2005 to BeneFlex were, in fact, "covered by" the parties' agreements at both locations.

DuPont's authority to make unilateral changes did not arise exclusively from an expired contractual "management rights" clause.

Therefore, the Union's commitment to the "reservation of rights" language did not expire with the contract because the on-going agreement was never contained only there. Instead, because BeneFlex continued post-contract, so did the "reservation of rights" in the plan itself. The Union's acceptance of that language (and the benefits of the plan) was always independent of, and in addition to, the collective bargaining agreements. As correctly noted by the dissent:

> Further, in contrast to management-rights clauses which cover subjects not otherwise dealt with in the contract, the reservation of rights clause in the BeneFlex Plan is itself part of the benefits plan to which the parties agreed contractually. The Respondent and the Union struck a deal, under which unit employees would receive the benefits provided under the Plan, subject to the Plan's terms and conditions, one of which is the Respondent's reservation of a right to make changes to the Plan. To hold that latter condition, as a matter of law, to be a management-rights clause would be to create, postcontract expiration, an arrangement to which the Respondent *never agreed*.

(App. 20).

Only by permitting the changes at issue can the parties' mutual commitments be enforced. That is, the parties bargained for and agreed that the Louisville and Edge Moor workers would receive the national BeneFlex program on the same terms and conditions as all other employees. For the NLRB to allow the Union to choose only those portions of the plan it desires undeniably alters the agreed upon benefit; i.e., receipt of DuPont's nationwide BeneFlex program - - a fact not lost upon the dissent: "The Respondent *never* agreed to provide benefits under the Plan uncoupled from a unilateral right to make changes therein. It agreed to provide those benefits conditionally, and those conditions are as much a part of the parties' agreement concerning benefits as are the benefits themselves". (App. 20).

A ruling that DuPont's actions were privileged due to the agreed-upon reservation of rights language in BeneFlex is consistent not only with the NLRA, but also with overriding federal policy governing employee benefit plans. Under ERISA, employers are generally free to modify welfare benefit plans, provided they have not ceded that right, which DuPont clearly has not done. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). ERISA further requires that "every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 USC § 1102(a)(1). DuPont complied with ERISA in establishing BeneFlex and with the NLRA by bargaining to an agreement with the Union concerning BeneFlex, including the accompanying reservation of rights language.

The NLRB's ruling here arbitrarily strips the reservation of rights language from the ERISA plan documents and improperly amends BeneFlex. As one court put it: "we do not possess the authority to rewrite the Plan in [plaintiff's] benefit." Admin. Comm. of the Wal-Mart Stores, Inc. v.

Varco, 338 F.3d 680, 692 (7th Cir. 2003). See also Burke v. PricewaterhouseCoopers LLP Long Term Disability Plan, 572 F.3d 76, 81 (2d Cir. 2009) (a court must not rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous.); Davolt v. Executive Comm. of O'Reilly Auto., 206 F.3d 806, 810 (8th Cir. 2000) (Any other interpretation would be at variance with the plan's plain language, and we are not permitted to rewrite the plan simply to suit sympathetic situations.). In effect, the Board in this case rewrote the parties' agreement, injecting itself into a contractual dispute in a way that exceeds its statutory authority. See Honeywell International, Inc. v. NLRB, 253 F.3d 119, 124-125 (D.C. Cir. 2001).

The NLRB defended its "waiver" analysis by arguing that it was promoting collective bargaining by expanding an employer's bargaining obligation. (App. 16-17). The NLRB used this same rationale to reject this Circuit's "covered by contract" approach, claiming that adopting that standard "would create a significant and unbargained-for shift of rights to employers and away from employees and unions". Provena St. Joseph Medical Center, 350 NLRB at 813. This result-oriented reasoning ignores more fundamental policies of the NLRA. As recognized in Chicago Tribune, 974 F.2d at 937: "Unions employ experienced contract negotiators who do not need special rules of construction to prevent them from being outwitted by company negotiators."

Traditional principles of contact interpretation should not be cast aside in favor of "a doctrine that tilts decisions in the union's favor." Id. This Court has recognized that a waiver analysis is contrary to, rather than supportive of, the primary statutory purpose of promoting collective bargaining through the negotiation of union contracts. "Implicit in this statutory purpose is the need to provide the parties to such agreement with stability and repose with respect to matters reduced to writing in the agreement." Department of the Navy v. FLRA, 962 F.2d 48, 59 (D.C. Cir. 1992). As applied by the NLRB here, the waiver approach undermines this most basic statutory policy by requiring endless bargaining, robbing the parties' agreements of all meaning, and defeating stability in labor relations.

DuPont's right to make annual, nationwide unilateral changes was unquestionably "covered by" the Union's agreements to accept BeneFlex at each location. The Board's finding that the so-called Union "waiver" of DuPont's right to make those changes somehow "expired" has no support factually or legally, and the Board's Order should be reversed.

II. DuPont Was Authorized To Make Unilateral Changes To BeneFlex Consistent With Past Practice And The Status Quo.

Alternatively, DuPont's petition for review should be granted because the unilateral changes to BeneFlex in 2004 and 2005 maintained the status quo at both sites. Indeed, had DuPont not implemented the national changes to BeneFlex at Louisville and Edge Moor, it would have unlawfully deviated from the existing practices of the parties, thereby failing to provide the bargaining unit with the nationwide plan to which the parties agreed. As the dissent below aptly observed, ". . . under certain circumstances, not to change would be to change." (App. 20).

It is well established that during bargaining, an employer is required to maintain the status quo and to refrain from unilateral changes to terms and conditions of employment. Katz, 369 U.S. at 745-46. However, Katz also noted that an employer's obligation to maintain the status quo may, in fact, require unilateral action if that is part of the status quo. Id. (unilateral implementation of merit wage increases is a refusal to bargain "unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews – in effect, were a mere continuation of the status quo….").

The Board has consistently applied the Katz principle, maintaining that the status quo can include unilateral action if consistent with past practice. "[A] unilateral change made pursuant to a long-standing practice is essentially a continuation of the status quo – not a violation of Section 8(a)(5)." Courier-Journal, 342 NLRB at 1094 (citing Katz, 369 U.S. at 743).

For example, long ago in Shell Oil Co., 149 NLRB 283, 289 (1964), the Board found that the employer lawfully implemented a subcontracting decision after the expiration of the union contract because the unilateral exercise of that right was so well established that it became a term and condition of employment. The Board subsequently followed the same principles in many decisions involving medical benefits.[10]

This approach to the preservation of the status quo has been consistently accepted by the courts. In Beverly Health & Rehab. Servs. v. NLRB, 297 F.3d 468 (6th Cir. 2002), the Sixth Circuit specifically held that the ability to act unilaterally may become part of the "past practice" of the parties, and that an employer does not alter the status quo by continuing that past practice:

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[10] See Brannan Sand and Gravel, 314 NLRB 282 (1994) (the employer's unilateral changes to its health plan were permissible even though negotiations were on-going); Nabors Alaska Drilling, Inc., 341 NLRB 610 (2004) (employer lawfully made unilateral changes to its health plan given that health insurance review was an annually occurring event); A-V Corp., 209 NLRB 451 (1974) (employer did not violate the Act by allocating insurance premium increases to employees after expiration of a contract when consistent with past allocations of premium increases to which the union never objected).

> We interpret Shell Oil and its progeny as standing for the proposition that if an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral change becomes a "term and condition of employment," and that a similar unilateral change after the termination of the CBA is permissible to maintain the status quo. Thus, it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.

Id. at 481. See also Uforma/Shelby Business Forms v. NLRB, 111 F.3d 1284 (6th Cir. 1997); Litton Microwave Cooking Prods. Div. v. NLRB, 868 F.2d 854, 858 (6th Cir. 1989) ("an examination of the history and practices of [the employer] and the Union in this case reveals that the Union believed that the…agreement permitted [the employer] to act unilaterally"). As the Sixth Circuit noted, the employer's on-going authority to make unilateral changes consistent with past practice may become the status quo, regardless of whether the contract has expired.

Board precedent is in accord, holding that a past practice developed under a management-rights clause can exist independent of that clause and survive expiration of that clause. In Capitol Ford, 343 NLRB at 1058, the NLRB confirmed that a past practice arising under a collective bargaining agreement privileged an employer's unilateral action post-expiration. In that case, a successor employer implemented a productivity bonus, which it subsequently modified, without any bargaining with the union. The NLRB adopted the ALJ's finding that the changes were permissible, and rejected the argument that the practice was no longer valid simply because the contract provision which authorized the practice had expired:

> Our colleague is correct in saying that a successor employer who does not adopt the predecessor's contract cannot rely upon the management rights clause of that contract to justify unilateral action. However, the instant case involves the predecessor's practice of acting unilaterally with respect to bonuses. The Respondent was privileged to continue that practice and did so in this case. Contrary to our colleague, the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice. The Respondent's reliance on its predecessor's past practice is not dependent on the continued existence of the predecessor's collective bargaining agreement.

Id. at 1058 n. 3 (emphasis added). The majority below left this important precedent unmentioned.

The Board's Courier-Journal cases reached the same result in addressing an employer's unilateral changes to healthcare plans, finding that a practice of making annual changes continues after contract expiration. See The Courier-Journal, 342 NLRB 1093 (2004) (Courier I); The Courier-Journal, 342 NLRB 1148 (2004) (Courier II). In those cases, the Board explained that the correct analytical framework for these post-expiration changes to health benefits was the status quo rubric, given the employer's established past practice of unilateral action. The Board concluded the employer's changes did not violate the NLRA, because the ability to act unilaterally had become the status quo and the challenged benefit modifications were consistent with the status quo, rather than altering it.

These Board holdings merely confirm long-standing precedent that an employer's obligation to maintain the status quo may include instances where the employer is privileged to act unilaterally, sometimes referred to as maintaining the "dynamic status quo." The doctrine is so well established that the converse also applies -- an employer violates the NLRA if it fails to continue a past practice of unilateral action that has become the status quo.[11]

The NLRB's decisions did not reject this long line of authority, but instead attempted to distinguish and re-craft the holdings in Courier-Journal:

> In the Courier-Journal cases, a Board majority found that the employer's unilateral changes to employees' healthcare premiums during a hiatus period between contracts were lawful because the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods. The Respondent's asserted past practice in this case, in contrast, was limited to changes that had been made when a contract, which included the reservation of

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[11] See Daily News of Los Angeles, 315 NLRB 1236 (1994), enf'd, 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) (unilateral discontinuance of merit pay increases violated Section 8(a)(5)); Eastern Maine Medical Center v. NLRB, 658 F.2d 1, 9 (1st Cir. 1981) (employer's decision to withhold merit wage increase to newly organized employees violated the NLRA); NLRB v. Beverly Enterprises, 174 F.3d 13, 25-28 (1st Cir. 1999) (change in employer's system of providing merit wage increases violated the NLRA).

> rights language, was in effect. It is apparent that a union's acquiescence to unilateral changes made under the authority of a controlling management clause has no bearing on whether the union would acquiesce to additional changes made after that management rights clause expired.

(App. 15-16).[12]

The NLRB's analysis simply fails. As an initial matter, DuPont presented undisputed evidence that BeneFlex had been changed during hiatus periods. Specifically, DuPont implemented changes to BeneFlex in 2003 during a hiatus period at Louisville.[13] More importantly, as noted by the dissent, there was nothing in the reasoning of the Courier-Journal decisions that suggested that post contract hiatus changes dictated the outcome in those cases.

In fact, the Courier-Journal decisions and other dynamic status quo cases do not turn on "when" the past practice existed. Rather, they properly turn on "if" a past practice exists. Focusing on whether a practice developed inside or outside of a contract term lapses into the "waiver" analysis, rather than a past practice, status quo approach based on the parties' actions. Capitol Ford, 343 NLRB at 1058 n. 3. The Courier Journal line of cases specifically notes that waiver has no applicability where a past practice of unilateral action rises to the level of status quo. Thus, the Board majority's myopic focus on its "waiver" standard ignores its own precedents. (See App. 16-17).

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[12] The majority also commented that the Courier-Journal decisions were "in tension" with "previously settled principles" but declined to elaborate, while portentously stating that it need not "reconsider" the holdings in the Courier-Journal cases "at the present time." (App. 16).

[13] This evidence was simply ignored by the NLRB. See International Union, UAW v. NLRB, 802 F.2d 969, 975 (7th Cir. 1986) (the Board seems to have confined its attention to evidence that supported its conclusion and ignored any contrary evidence – "an ostrich's approach which administrative agencies are not authorized to follow").

The NLRB's decision creates an artificial and ultimately irrelevant distinction based solely on whether a past practice arose inside or outside of the term of the parties' contract. From a doctrinal standpoint, the case law does not demand that a past practice include unilateral action outside of the parties' contract because that aspect is inconsistent with the underlying premise of the NLRB status quo holdings, that it is the scope and consistency of the action that creates the past practice – not the timing of when the practice arises. In that regard, the Sixth Circuit's discussion is worth repeating:

> …a pattern of unilateral change becomes a "term and condition of employment," and that a similar unilateral change after the termination of the CBA is permissible to maintain the status quo. **Thus, it is the actual past practice of unilateral activity under the management-rights clause of the CBA,** and not the existence of the management-rights clause itself**, that allows the employer's past practice of unilateral change to survive the termination of the contract.**

Beverly Health and Rehabilitation Systems v. NLRB, 297 F.3d 468, 481 (6th Cir. 2002) (emphasis added). See also Capitol Ford, 343 NLRB at 1058 n.3 ("the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of a past practice").

Courier-Journal confirmed that it is the creation of the past practice of unilateral changes that controls – a fact noted by the dissent and ignored by the majority.

> From 1996 to 2002 the Respondent unilaterally implemented changes to the BeneFlex Plan on an annual basis pursuant to the "reservation of rights" clause. In each instance, the Union did not oppose the Respondent's changes.
>
> Following the expiration of the parties' contract in 2002, the Respondent was required to maintain the terms and conditions of employment under the expired collective bargaining agreement until the parties negotiated a new agreement or bargained in good faith to impasse [citations omitted]. That duty to maintain the status quo required the Respondent to continue to provide benefits under the BeneFlex Plan and to implement the BeneFlex Plan in *the same manner* that it had been implemented in the preceding years, including its annual changes to the Plan, which it implemented nationwide for unit and nonunit employees alike. Thus, the Respondent's modifications to the BeneFlex Plan on January 2004 and 2005 did not constitute unilateral change, but rather, were consistent with the status quo.

(App. 20).

Here, BeneFlex annual changes continued out of contract because they preserved an established entrenched practice and were not, as the Board erroneously concluded, merely privileged by a contractual waiver. Thus, in accordance with the many "dynamic status quo" precedents, DuPont here did not violate Section 8(a)(5) because it acted pursuant to a well established past practice – the annual nationwide changes to BeneFlex. The Board's finding that DuPont's actions were unlawful should be reversed because it ignores both the facts and the established law.[14]

III. The Union Waived Its Right To Bargain Over The Alleged Changes.

Even under the NLRB's erroneous waiver analysis, DuPont's conduct was proper because the Union did abandon its right to bargain over BeneFlex changes, both expressly and by the parties' conduct.

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[14] The Board's finding here also conflicts with ERISA policies, because it results in the inconsistent application of a national ERISA plan. In essence, the Board's decision creates a "New Beneflex," with different rules for Louisville and Edge Moor union workers than for all other DuPont employees. In Conkright v. Frommert, 130 S. Ct. 1640, 1643 (2010), Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009), and Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 122 (2008), the Supreme Court emphasized that a key goal of ERISA is to promote uniformity and predictability in employee benefit plans. Courts have repeatedly emphasized that ERISA is designed to favor simple administration by creating a single set of rules for the employer to follow, which is exactly what DuPont did here. See Kennedy, 129 S.Ct. at 875 (noting ERISA created a straightforward rule of hewing to the directives of plan documents that let employers establish a uniform administrative scheme). The NLRB cannot simply proclaim that the expiration of the parties' collective bargaining agreement suddenly "uncouples" the bargaining units from the rules and provisions that govern all "BeneFlex" beneficiaries (including the reservation of rights language).

A waiver may be express or it may be inferred from conduct. See, e.g., Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (a unilateral change by an employer may be permissible if the Union has "clearly and unmistakably" waived its statutory right to bargain over the particular subject matter); Resorts Int'l Hotel Casino v. NLRB, 996 F.2d 1553, 1559 (3d Cir. 1993). See also Kiro, Inc., 317 NLRB 1325 (1995) (union's waiver of its statutory right to bargain over a particular matter can occur by the express language in the collective-bargaining agreement, or it may be implied from the parties' bargaining history, past practice, or a combination of both).

With respect to an express waiver, the collective bargaining agreements here both provided in Article IX that benefits (including BeneFlex) are "…subject to the provisions of such Plans and to such rules, regulations, and interpretations as existed before the signing of this Agreement, and to such modifications thereof as may be hereafter adopted generally by the COMPANY to govern such privileges." The parties thereby agreed that acceptance of BeneFlex was subject to the broad "reservation of rights" clause set forth in the BeneFlex and BeneFlex Medical plan documents. Therefore, the Union's clear and unmistakable waiver was not tied solely to the collective bargaining agreement as the

NLRB majority incorrectly found because the Union's express waiver also arose from the adoption of the plan documents, which survived contract expiration. The Union agreed to a plan that is uniform for all DuPont domestic employees and changes annually. In order for either side to get the benefit of its bargain, the Union agreed to a clear and unmistakable waiver.

In addition, as noted, Board precedent provides that a waiver may be inferred based on the parties' conduct. For example, in Cal. Pac. Med. Ctr., 337 NLRB 910, 914 (2002), in dismissing a refusal to bargain charge, the Board held: "… as noted above, the past practice of the parties demonstrates that the Respondent has historically exercised, on numerous occasions, the right to lay off without prior bargaining about the decision to do so. A clear and unmistakable waiver may be inferred from past practice." Id. See also, Kiro, Inc., 317 NLRB at 1328 ("A waiver may also be inferred from extrinsic evidence of contract negotiations and/or past practice"); Allison Corp., 330 NLRB 1363, 1366 (2000) (same).

The same principles apply to employee benefits. In Mt. Clemens General Hosp., 344 NLRB 450 (2005), for nearly twenty years the hospital made annual changes to a pension plan without bargaining. The union first raised a challenge in 2003. The Board dismissed the unfair labor practice charge finding that the past practice amounted to a waiver of the Union's right to bargain over changes:

> Moreover, the courts and the Board have held that a waiver also may be inferred from extrinsic evidence of the contract negotiations and/or practice (citations omitted). A waiver can be inferred here from the undisputed evidence showing that the Union never bargained over any TSA [i.e. pension] changes, never requested to bargain over them, and never objected to any of the changes.
>
> * * *
>
> The circumstances here present a stronger case for finding no violation because here there is no contractual language which provides for a collectively-bargained TSA plan. Instead, there is a 20 year history of making unilateral changes to the TSA program, which was accepted without opposition by the Union.

Id. at 460.

As has been noted, both the parties' bargaining history, as well as their well established past practice, demonstrate that the Union was unmistakably aware it was giving up the right to bargain over changes to BeneFlex. Every fall for ten years, DuPont announced and subsequently implemented its annual changes without objection from the Union. Thus, the parties' past practice confirms that the Union did, in fact, knowingly waive its rights in exchange for the participation of its members in BeneFlex. Accordingly, even under the Board majority's incorrect approach, DuPont's actions in 2004 and 2005 still do not make out a violation of Section 8(a)(5).

IV. At Edge Moor, the Union Was Provided With A Reasonable Opportunity To Bargain, So The Implementation Of The 2005 Changes Was Lawful.

Assuming, arguendo, that DuPont had a bargaining duty with respect to the 2005 BeneFlex changes, it was fulfilled at Edge Moor because the Union failed to take advantage of its opportunity to negotiate those changes.

A. The Facts

The facts relating to bargaining at Edge Moor in 2004 are summarized supra at pps. 15-16. Additional relevant facts are set out below.

By the time negotiations began, the Union at Louisville had already filed an unfair labor practice charge over the 2004 BeneFlex changes. (App. 535) Seeking to avoid similar litigation at Edge Moor, DuPont proposed that the collective bargaining agreement expressly state what had always been the case: that the Company retained the right to adjust BeneFlex annually, even after expiration of the labor contract, until the parties negotiated a different arrangement. (App. 536-37, 575). The Union steadfastly refused to consider the proposal, as it was legally privileged to do. (App. 811). DuPont negotiators suggested that the parties' consider an alternative plan if the Union would not entertain DuPont's proposal in its entirety.[15] (App. 540). The Union made no counterproposal for months. (App. 540-541, 576-578).

Finally, at the twenty-second session on September 22, the Union brought representatives from Blue Cross and Blue Shield of Delaware ("BCBSD") for an "information session" about a possible new plan, but no proposal was made. (App. 544). This session also marked a change in the Union's negotiating team. Attorney Kathleen Hostetler was replaced by attorney James Runckel as the Union's chief spokesperson for the balance of 2004.

The annual nationwide modifications to BeneFlex were announced at Edge Moor on October 11, 2004. (App. 545, 642: ¶53). At the next bargaining session, just two days later, the Union did ***not*** request to bargain these changes. (App. 545-46). DuPont negotiators suggested that, in the absence of a Union counteroffer, bargaining unit personnel should make their annual enrollment period elections. The Union did not object. (App. 545-46, 812-13).

On October 14, Attorney Hostetler briefly reappeared, but only with a letter requesting bargaining over the proposed BeneFlex Plan changes for

[15] This proposal to continue the benefits program included the express right to make in and out of contract changes, as well as the continued guarantee that Edge Moor workers would participate in BeneFlex on the same terms and conditions as all other participants.

2005. (App. 546, 812-13). However, the Union negotiators led by Runckel at the table clearly abandoned this token request, ***never*** expressing any desire to bargain over, or saying anything about, this topic. (App. 547).

The Union finally proposed an alternative to BeneFlex on November 8, 2004, almost a full month after the 2005 changes were announced and months into the parties' bargaining. (App. 814-36). Once again, nothing at all was said about the 2005 BeneFlex Plan changes.

On November 16, the Union precipitously withdrew its proposal and offered two new alternatives. (App. 549, 837-38). The first gave DuPont until 6:00 p.m. that day to withdraw its long-standing BeneFlex proposal in exchange for the Union's acceptance of "all terms of the 2005 BeneFlex Plan, as previously announced [*i.e.* including the 2005 changes]." (App. 837). The second regressively modified the Union's November 8 BCBSD proposal. DuPont rejected both proposals. (App. 549). Again, the Union made no move to bargain the upcoming BeneFlex changes.

The Union's BCBSD proposal had required employee enrollment by December 15 and thus had lapsed by its own terms by the next bargaining session on December 16. Since no agreement had been reached and no further negotiation sessions were scheduled in 2004, DuPont acted to ensure coverage for its workforce and announced that the changes would be implemented on January 1, 2005. (App. 549-50, 815).

Subsequent to the November 16, 2004 session, it is undisputed that the Union never revisited its BCBSD proposal (App. 551) and never sought to discuss any of the specific changes for the 2005 BeneFlex plan year. (App. 535, 547).

B. Argument

As noted, during contract negotiations, an employer ordinarily must refrain from implementing any changes to subjects covered by its bargaining duty, absent agreement or overall impasse. Bottom Line Enterprises, 302 NLRB 373, 374 (1991), enforced sub nom., Master Window Cleaning, Inc. v. N.L.R.B., 15 F.3d 1087 (9th Cir. 1994); Our Lady of Lourdes Health Center, 306 NLRB 337, 339-340 (1992). However, this "all or nothing" approach does not apply to discrete recurring events, such as the annual BeneFlex changes at issue here.

Stone Container Corporation, 313 NLRB 336 (1993), is the seminal decision on an employer's obligation to address discrete and reoccurring events "that simply happen to occur while contract negotiations are in progress." So long as an employer gives its union prior notice and an opportunity to bargain, it need not await impasse in overall contract talks before tackling these "annually occurring events." Id. at 336. The Board has long recognized annual adjustments to healthcare costs and benefits as just such events. Brannan Sand and Gravel Co., 314 NLRB at 282 (where healthcare costs and benefits were annually reviewed and adjusted, the employer was not obligated to refrain from implementing proposed changes until impasse was reached on negotiations as a whole); Accord, St. Gobain Abrasives, Inc., 343 NLRB 542 (2004), enf'd 426 F.3d 455 (1st Cir. 2005); Nabors Alaska Drilling, 341 NLRB at 610.

The NLRB undertook a detailed review of these legal principles in TXU Electric Company, 343 NLRB 1404 (2004). Relying upon Stone Container and Alltel Kentucky, 326 NLRB 1350 (1998), the Board reaffirmed that an employer, after notice and an opportunity for bargaining, may unilaterally address an annually recurring "discrete event" without having reached overall agreement or impasse. The Board reasoned that there must be an exception to the general principles governing collective bargaining in these circumstances:

> . . . this case deals with a situation in which piecemeal treatment is unavoidable, at least on an interim basis. The date for annual review and possible wage adjustment was approaching. Absent a contract on that date, the Respondent had to do *something* with respect to that matter. It could not wait for an overall impasse.

TXU Electric., 343 NLRB at 1407 (emphasis in original).

Once an employer has given a union notice of a recurring, discrete event, the "union must act with due diligence to request bargaining, otherwise it may be found to have waived its right to bargain over the matter." Bell Atlantic Corp., 336 NLRB 1076, 1086 (2001).[16] Moreover, a union's efforts must be diligent, as it must legitimately seek to bargain and then affirmatively act to effectuate bargaining. A token request is not enough, and union inaction defeats any claim of a right to bargain. AT&T Corp., 337 NLRB 689 (2002).

At Edge Moor, the Union never sought to bargain the 2005 BeneFlex changes beyond the token request made through Hostetler's letter, which the Union negotiators themselves ignored in favor of bargaining over benefits generally in an effort to reach an overall contract. The Union's failure to address the annual changes across the table in any of the parties' numerous face to face negotiating sessions in the fall of 2004 permitted DuPont to move ahead with those changes while continuing to bargain for a

[16] "[A] union which receives timely notice of a change in conditions of employment must take advantage of that notice if it is to preserve its bargaining rights and not be content in merely protesting an employer's contemplated action." Clarkwood Corp., 233 NLRB 1172 (1977) (citing American Bus Lines, Inc., 164 NLRB 1055, 1056 (1967) and Medicenter, Mid-South Hospital, 221 NLRB 670 (1975)).

comprehensive settlement. The opinion below errs in two regards on this point.[17]

First and foremost, Stone Container applies. The conclusion below that the 2005 changes were not "discrete" (there is no doubt that they were "recurring"), because they "did not concern a discrete subject . . . but rather extends to all subjects that fall under the general heading of benefits," and concerned a "breadth of changes" is absolutely incorrect. (App. 37). This case deals with only one of DuPont's twelve "Industrial Relations Plans," *i.e.*, the BeneFlex Plan, and the scope and types of changes involved here fit squarely within established case law.

The benefits changes at issue in Brannan Sand and Gravel, Saint-Gobain and Nabors Alaska Drilling were every bit as expansive as DuPont's BeneFlex changes. Thus, in Brannan Sand and Gravel, 314 NLRB at 285-86, "the 1992 [health plan] changes here were hardly minor, as nearly every health plan benefit was affected and employee contributions increased substantially." In Saint-Gobain, 343 NLRB at 543, the annual company changes to its healthcare program involved "differing co-pays, deductibles and other elements and, of course, . . . differing premiums", and Nabors

[17] The ALJ at Edge Moor rejected DuPont's argument that it was privileged to implement the 2005 BeneFlex changes under Stone Container. (App. 37-38). The NLRB did not address this issue.

Alaska Drilling, 341 NLRB at 611, involved a challenge to "certain changes to the healthcare program," in addition to increases to employee co-pay contributions. The governing case law does not support the mistaken view that a "discrete" event arises only where management discretion is limited to a single change to a single benefit or is otherwise narrowly circumscribed. Indeed, in both Stone Container and TXU, the "discrete event" involved the unlimited management discretion to set annual wage increases, including the right to grant no raises at all.

Second, at Edge Moor the Union was given an adequate opportunity to bargain over these impending changes and chose not to do so. Although the October 14, 2004 letter from Attorney Hostetler requested bargaining, this was a token demand, and the Union did nothing to act on it. "The union did not suggest or propose specific modifications to the Plan changes." (App. 33).

Nevertheless, the decision below found that because the Union eventually proposed alternatives to the overall BeneFlex Plan and suggested that DuPont drop its proposal regarding contract language changes, the parties bargained the 2005 BeneFlex changes. (App. 39). This flawed reasoning confuses the concept of bargaining on the topic of benefits generally with the Union's more specific obligation to pursue bargaining over the pending, discrete Beneflex changes. Once again, this conclusion is at odds with established Board precedent.

The Stone Container rule requires only that a union be provided with a reasonable opportunity to bargain. The fact that the parties bargained over a possible replacement for the entire BeneFlex plan or that the Union suggested that DuPont drop its language proposal does not mean that the Union took the opportunity to bargain the 2005 changes. The record facts come close to replicating those presented in Nabors Alaska Drilling, 341 NLRB at 610. In that case, for many years, the employer had reviewed its healthcare plan at year's end, often adjusting many items such as benefit levels, co-payments and administrators. While at the bargaining table, and while actively negotiating healthcare as part of broader contract bargaining, the employer notified the union that it intended to make certain program changes effective January 1. The union made no proposals on the changes, so the employer implemented while, just like here, continuing to bargain towards an overall resolution of the contract, including the topic of benefits generally.

A similar result was reached in Saint-Gobain Abrasives, Inc., supra. While embroiled in protracted contract talks, the employer announced a series of changes to its nationwide benefits program. The employer sought autonomous bargaining on these interim changes, but the union refused, out of a desire to leverage the medical insurance issue into an overall contract settlement. Again, no violation was found.

Thus, the unilateral changes at issue in every one of the Stone Container line of cases took place within the context of overall contract negotiations, again just as here. Indeed, in Saint-Gobain, Brannan Sand and Gravel, and Nabors Alaska Drilling, the annual health benefit changes were unilaterally implemented while broader contract talks were ongoing on the overall subject of benefits, just as here.

Given the Union's abject failure to properly address the discrete recurring type of topic of the annual changes to BeneFlex at either location, despite receiving notice and a fair opportunity to bargain, the NLRB's decision below should be reversed.

V. The Board's Order, If Enforced, Should Be Enforced Prospectively.

DuPont also submits that in the unlikely event that this Court agrees with the NLRB's flawed "waiver" analysis, the NLRB's order should be applied prospectively given the history of changes to BeneFlex, the NLRB's prior endorsement of those changes, and the length of time which has passed.

The NLRB has long been aware of both the collective bargaining language, the reservation of rights clause and DuPont's practice with respect to unilateral changes to BeneFlex because it previously investigated unfair labor practice charges raising the precise issues in this appeal -- and found that the practice was permissible even after contract expiration because the unilateral changes to BeneFlex were consistent with the expired contract language and past practice.

In 1996, DuPont and Dow Chemical created a joint venture, DuPont Dow Elastomers (DDE), which took over a portion of DuPont's Louisville operations. (App. 143: ¶2). DDE purchased BeneFlex from DuPont for its employees, (app. 146: ¶13), and DDE and the Union bargained contract language with respect to BeneFlex and BeneFlex Medical identical to that agreed to by the Union and DuPont. (App. 151: ¶ 24, 260-62). Every year, employees of DDE (like DuPont), were informed in the fall of the upcoming changes to BeneFlex. All changes to BeneFlex were likewise annually implemented for unionized DDE employees during the period 1996-2005. (App. 147-64: ¶¶ 14, 16, 21, 25, 27, 29, 41, 52, 58, 63).

The contract between DDE and the Union expired on September 18, 2001. On November 13, 2001, the Union filed NLRB Charge No. 9-CA-

38870-1, contending that DDE had violated Section 8(a)(5) by announcing the 2002 changes to BeneFlex without bargaining. (App. 159: ¶ 43, 351).

On January 7, 2002, Region 9 of the NLRB dismissed that unfair labor practice charge on the merits, finding that DDE had a well established past practice of making unilateral changes to BeneFlex. (App. 159: ¶ 44, 352-53). In reaching this conclusion, the Region found that DDE's actions maintained the status quo between the parties, stating: "the Employer's actions were in accordance with the terms of the expired collective bargaining agreement and past practice." (App. 352). The NLRB's Office of the General Counsel then rejected a Union appeal of that decision, specifically noting DDE's actions were "in conformance with the expired collective bargaining agreement." (App. 354). In other words, by implementing the changes to BeneFlex, DDE maintained the status quo for its workers as established under the then expired agreement.

What is particularly telling about the NLRB's treatment of DDE charge is that the BeneFlex changes implemented for DDE employees were the same as those received by DuPont employees. The expired DDE collective bargaining agreement used the same language (mentioning BeneFlex Medical but not BeneFlex) as the collective bargaining agreement in issue at Louisville.

In light of these circumstances, DuPont submits the majority's ruling below is arbitrary and capricious because the NLRB is attempting to apply a new "waiver" analysis retroactively, contrary to its earlier approval of unilateral changes to BeneFlex as consistent with the status quo/past practice.

There is ample precedent for finding that an agency's change in interpretation applied retroactively is arbitrary and capricious:

> On the other hand, due process concerns may warrant denial of endorsement of an agency determination when conduct previously approved by a regulatory agency is retroactively branded as a statutory violation. As Judge Friendly colorfully expressed in the labor relations context:
>
>> Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as "unfair" conduct stamped "fair" at the time a party acted, raises judicial hackles considerably more than [for instance, imposing a more severe remedy for conduct already prohibited]. And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.

U.S. v. Cinemark USA, Inc., 348 F.3d 569, 581 (6th Cir. 2003) (citing NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966)); see also NLRB v. E&B Brewing Co., 276 F.2d 594, 600-601 (6th Cir. 1960).

A review of NLRB precedent governing the "dynamic status quo" establishes that DuPont's unilateral implementation of the BeneFlex changes was permissible at the time taken in 2004 and 2005. Five years later, the NLRB is attempting to ignore that precedent without overruling it, by now applying a "waiver" analysis. The impact is to "undo" lawful benefit changes made nationally over five years ago - - changes which have since been relied on in making additional changes after 2005. The Board's attempt to "undo" those changes by altering the rules of the game years after the fact is arbitrary and an abuse of discretion. Based on the foregoing, DuPont's Petition For Review should be granted.

CONCLUSION

The majority reached the outcome that it desired here simply by sticking a label on this case, i.e., "waiver." This is a results-oriented label, because it changed the parties' bargain and also changed the analytical framework, requiring DuPont to meet the high bar of proving that the Union "clearly and unmistakably" waived statutory rights. By applying "waiver" to this case, the Board also conveniently attempts to circumvent this Circuit's more practical "covered by contract" analysis and sidesteps its own precedent, which holds that past practices/status quo survive contract expiration.

As demonstrated above, while DuPont prevails under any of these theories, the waiver approach simply does not fit the record facts. By defaulting to the standard that is the most difficult for an employer to meet, the Board majority has not only reached the wrong result, but also threatens to unravel labor-management agreements over nationwide benefit plans - - a result which will ultimately hurt both employers and employees by jeopardizing benefits for several groups of workers with splintered bargaining over benefit plans.

Based on all of the foregoing, DuPont asks that the Court grant its Petition for Review and deny enforcement of the NLRB's Orders below.

For E.I. du Pont de Nemours and Company:

/s/ Mark L. Keenan
Mark L. Keenan
Brennan W. Bolt
McGuireWoods, LLP
1170 Peachtree Street NE
Suite 2100
Atlanta, GA 30309
(404) 443-5500

Steven W. Suflas
Denise M. Keyser
Ballard Spahr LLP
210 Lake Drive East, Suite 200
Cherry Hill, NJ 08002-1163
(856)761-3466

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

E.I. du Pont de Nemours and Company,

Petitioner,

v.

Case No.: 10-1300
Consolidated with 10-1301, 10-1353, 10-1355

National Labor Relations Board

Respondent.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union,

Intervenor for Respondent.

CERTIFICATE OF COMPLIANCE

COME NOW Petitioner, E.I. du Pont de Nemours and Company and E.I. du Pont de Nemours, Louisville Works, and certifies to this Honorable Court that:

1. This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,201 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Time New Roman.

/s/ Mark L. Keenan
Mark L. Keenan
mkeenan@mcguirewoods.com
Brennan W. Bolt
bbolt@mcguirewoods.com
McGuireWoods, LLP
1170 Peachtree Street NE, Suite 2100
Atlanta, GA 30309
(404) 443-5500
Steven W. Suflas
suflas@ballardspahr.com
Denise M. Keyser
keyserd@ballardspahr.com
Ballard Spahr LLP
210 Lake Drive East, Suite 200
Cherry Hill, NJ 08002-1163
(856)761-3466

Attorneys for E.I. du Pont de Nemours and Company and E.I. du Pont de Nemours, Louisville Works

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the **Corrected Brief Of The Petitioner** with the Clerk of Court using the CM/ECF system, which will automatically send notice of such filing to the following, and that courtesy copies were sent via first-class mail to the following:

Linda J. Dreeben
appellatecourt@nlrb.gov
Robert J. Englehart
bob.englehart@nlrb.gov
Daniel Arthur Blitz
daniel.blitz@nlrb.gov

McKenzie Fillow
MacKenzie.Fillow@nlrb.gov
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Daniel M. Kovalik
dkovalik@usw.org
Mariana Luisa Padias
mpadias@usw.org
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Five Gateway Center, Suite 807
Pittsburgh, PA 15222

This 28th day of February, 2011.

/s/ Mark L. Keenan
Mark L. Keenan
McGuireWoods LLP
1170 Peachtree Street N.E.
Suite 2100
Atlanta, Georgia 30309
(404) 443-5500
mkeenan@mcguirewoods.com

McGuireWoods LLP
1170 Peachtree Street NE
Suite 2100
Atlanta, GA 30309